LIBRARY
SUPREME COURT, U. S.

FILED
MAR 20 1969
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

October Term, 1968

No. 1178

---

WARD INDUSTRIES CORPORATION,

*Appellants and Cross-Appellees,*

VS.

UNITED STATES OF AMERICA, *ex rel.*
MOSHER STEEL COMPANY,

*Appellees and Cross-Appellants.*

---

## PETITION BY WARD INDUSTRIES CORPORATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

JOSEPH LOTTERMAN
103 Park Avenue
New York, New York 10017
and
R. GRAEME SMITH
1 American Row
Hartford, Connecticut 06103

*Attorneys for Petitioner,*
*Ward Industries Corporation*

PAGE

Opinions Below ..... 2

Jurisdiction ..... 2

Questions Presented for Review ..... 2

Statutes Involved ..... 3

Statement of the Case ..... 4

The Employment of Mosher by Union to Fabricate Union's Steel ..... 5

IMI's Bankruptcy ..... 8

Ward's Motions for Summary Judgment and Dismissal ..... 11

The Decision of the Court of Appeals Herein ..... 12

Reasons for Granting the Writ—

1. The Final Judgment Against IMI Procured By Mosher In The IMI Bankruptcy Proceeding Was Based Upon Mosher's Claim That The Obligation For The Materials Fabricated And Delivered To The Tucson And Vandenberg Jobs Was An Individual Obligation Of IMI Created By The Independent Undertaking Of IMI. After Obtaining The Benefit Of That Final Judgment, Mosher Cannot, In Violation Of The Bankruptcy Act, 11 U.S.C. § 23 (g), Completely Reverse Its Position and Now Contend That The Obligation Upon Which It Collected In The Bankruptcy Court Was Not An Individual Obligation Of IMI But An Obligation Of The Joint Venture Of IMI-Ward .... 14

PAGE

2. The Statutory Scheme Of Distribution Embodied In The Bankruptcy Act, 11 U.S.C. § 23 (g), Cannot Be Circumvented And Annulled By The Device Of Including In The Proof Of Claim Filed By An Individual Creditor Upon The Individual Obligation Of An Individual Bankrupt The Statement That It Was Being Filed "without prejudice" To The Creditor's Right To Recover Against A Non-Bankrupt Partner Or Joint Venturer Upon The Ground That The Obligation Was In Fact A Partnership Or Joint Obligation ..... 22

CONCLUSION ..... 25

APPENDIX A—

Opinion of the United States Court of Appeals for the Ninth Circuit ..... 1a

## Table of Cases

PAGE

Eads Hide & Wool Co. v. Merrill, 252 F. 2d 80 (1958) ..... 11, 12, 13, 16, 18, 22, 25

Gardner v. New Jersey, 329 U. S. 569 ..... 22

In re F. J. Hacker & Co., 238 Fed. 146 ..... 19
In re F. J. Hacker & Co., 225 Fed. 869 ..... 19
In re Hurley Mercantile Co., 56 F. 2d 1023 ..... 20

Ruzicka v. Rager, 305 N. Y. 191 ..... 17

Schall v. Camors, 251 U. S. 239 ..... 17, 18
Schall v. Camors, 240 Fed. 6 affirmed in 251 U. S. 239.... 18

## Statutes

62 Stat. 928, 28 U.S.C. § 2354(1) ..... 2

11 U.S.C. § 23 (g) ..... 2, 3, 11, 12, 13, 14, 15, 16, 22, 23, 25

IN THE

# Supreme Court of the United States

October Term, 1968

No. .....

---

FLUOR CORPORATION, LTD., *et al.*, UNION TANK CAR COMPANY, WARD INDUSTRIES CORPORATION,

*Appellants and Cross-Appellees,*

vs.

UNITED STATES OF AMERICA, *ex rel.* MOSHER STEEL COMPANY,

*Appellees and Cross-Appellants.*

---

## PETITION BY WARD INDUSTRIES CORPORATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WARD INDUSTRIES CORPORATION ("Ward"), a Delaware corporation (R 1221), the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-captioned cause on the 6th day of January, 1969.

By its judgment, the Court of Appeals affirmed a judgment of the United States District Court for the District of Arizona, sitting at Tucson, Arizona, in favor of the plaintiff MOSHER STEEL COMPANY ("Mosher") and against the defendants, THE FLUOR CORPORATION LTD. ("Fluor") and the surety companies upon a Miller Act

bond, for the sum of $246,165.96 and against the UNION TANK CAR COMPANY ("Union") and Ward, the petitioner herein, for the sum of $268,882.92 (R 1241).

## Opinions Below

The opinion of the Court of Appeals is not yet reported but is printed as Appendix A, infra, pp. 1a to 14a. The District Court made findings of fact and conclusions of law (R 1220-1240) but rendered no opinion.

## Jurisdiction

On January 28, 1969, your petitioner filed a timely petition for a rehearing which was denied by the Court of Appeals on February 11, 1969. On February 19, 1969, the Court of Appeals entered an order staying the issuance of judgment pending the filing, consideration and disposition by this Court of a petition for a writ of certiorari to be made by Ward, providing such petition is filed in the office of the Clerk of this Court on or before March 19, 1969.

The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. § 1254(1).

## Questions Presented for Review

(1) Under the Bankruptcy Act, 11 U.S.C. § 23 (g), may a creditor, in the individual bankruptcy of a member of a known partnership or joint venture, file a claim against the bankrupt upon an individual obligation of the bankrupt, procure a final judgment in the bankruptcy proceedings against the bankrupt individually, share equally in the individual assets of the bankrupt with all other

individual creditors of the bankrupt and, then, after receiving the full benefits provided by such judgment in the Bankruptcy Court, recover the remaining balance of the claim from the non-bankrupt partner or joint venturer upon the ground that the claim was not an individual obligation of the bankrupt but was in fact a partnership or joint venture obligation?

(2) Can the statutory scheme embodied for many years in the Bankruptcy Act, 11 U.S.C. § 23 (g), be circumvented and annulled by the simple expedient of adding to a proof of claim filed by an individual creditor upon the individual obligation of an individual bankrupt the statement that it was being filed "without prejudice" to the creditor's right to recover, subsequently, any remaining balance against the non-bankrupt partner or joint venturer upon the ground that the obligation was in fact a partnership or joint venture obligation?

## Statutes Involved

The provisions of the Bankruptcy Act, 11 U.S.C. § 23 (g), are as follows:

> § 23, subd. (g) The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts and the net proceeds of the individual estate of each general partner to the payment of his individual debts. Should any surplus remain of the property of any general partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be distributed among

the individual partners, general or limited, or added to the estates of the general partners, as the case may be, in the proportion of their respective interests in the partnership and in the order of distribution provided by the laws of the State applicable thereto.

## Statement of the Case

The plaintiff, Mosher, is a steel fabrication firm located in Texas with its principal offices in Dallas and Houston. It brought this action in the United States District Court at Tucson, Arizona to recover the sum of $321,053.54 as the value of the services which it rendered and the materials which it furnished to Union under a written and oral contract with Union for Union's use in the erection of certain levels and structures at the missile launch facilities near the Davis-Monthan Air Base at Tucson, Arizona (the Tucson Project) and the Vandenberg Air Force Base at Vandenberg, California (the Vandenberg Project).

The prime contract for the Tucson Project was issued to Fluor by the United States Army Corps of Engineers Ballistic Missile Construction Office. Fluor, in turn, subcontracted a substantial portion of the work required by the prime contract to the Graver Mfg. Company ("Graver"), a division of Union.[1] Under its subcontract,

[1] The following terminology and abbreviations which were used in the Trial Court are employed in this petition: Union and Graver are used interchangeably as one and the same; Joint Venture refers to the joint venture consisting of Idaho-Maryland Industries, Inc. and the petitioner, Ward Industries Corporation, and is refered to as IMI-Ward; "R" refers to the Record on Appeal; "RT" refers to the reporter's transcript; "Jt." refers to joint exhibits stipulated by all of the parties; "Pl." refers to exhibits introduced in evidence by Mosher; and Ward and Union exhibits, respectively, are identified in each instance by the name of Ward and Union to the exhibits introduced by each.

Union was required to purchase, fabricate and erect the steel required for certain levels and structures upon the project (Jt. Exh. 2). Thereafter, Union subcontracted a portion of its subcontract work, including the steel fabrication, but not the steel erection, to a joint venture consisting of Idaho-Maryland Industries, Inc. ("IMI") and the petitioner, Ward (Jt. Exh. 8).

## The Employment of Mosher by Union to Fabricate Union's Steel

Prior to October 13, 1961, the task of fabrication had been assigned by IMI to its Denver Steel and Iron Division (R 1225). Because of an accelerated delivery schedule, Union's officers became concerned, prior to October 13, 1961, that Denver's production facilities were not adequate to fabricate Union's raw steel and deliver the fabricated product to Union within the time required by the project's delivery schedule (RT 180, 183; 184-185). Denver's general manager was thereupon authorized to place the work elsewhere (RT 186; 232). With Union's approval, Mosher was approached as a possible fabricator (RT 232-234). Mosher was willing to perform the fabrication work but refused to accept the credit of IMI, Ward or the joint venture of IMI-Ward (RT 74-75; 247; 437-439). It would only perform the work upon the express promise of Union to pay therefor (RT 249; 433-434).

Upon Union's oral and written agreement with Mosher that it would issue to Mosher its own purchase order and become directly and primarily responsible for the payment to Mosher of the fabrication costs, Mosher proceeded on a crash basis to perform the work of fabrication (RT 250). The work was commenced by Mosher on October 17, 1961, Mosher entering the necessary shop orders

upon its records for the fabrication of Union's steel (RT 78-79).

Subsequently, according to Mosher, and on October 31, 1961, IMI's representatives requested Moore, Mosher's Treasurer, to release Union from its obligation to Mosher and substitute the purchase orders of IMI for the purchase orders of Union (RT 262-264). According to Mosher, the IMI representatives informed Moore that IMI's bookkeeping would be simplified and its processing of Mosher's invoices facilitated if IMI were substituted for Union as the customer upon Mosher's books. Moore adamantly refused to release Union. He testified that he did not have the slightest interest in IMI's bookkeeping or invoice processing and did not care what name appeared as the customer upon Mosher's books "as long as Graver would be responsible for payment of the material" (RT 340-342).

Moore was perturbed by the IMI representatives' unexpected attempt to substitute what was to him a bad and thoroughly unsatisfactory credit for the credit of Union. He realized that the request "would constitute a change in the agreement which it (Mosher) theretofore had with Graver" (R 1470). As a result, Moore demanded from Union an explicit reaffirmation of its liability to Mosher and informed Union that he would not release any of the materials then being fabricated until he received that reaffirmation. He placed a stop order upon the very first shipment which was at that time virtually ready for delivery (RT 342-344).

On November 10, 1961, Mosher received, completely unsolicited and unanticipated, two purchase order forms of IMI (RT 439-440; Jt. Exs. 9 and 10), both of which were dated November 3, 1961 and signed by Frank J. Wright, the buyer for IMI (RT 153). One pertained to the Tucson Project and the other to Vandenberg. Moore

instructed Mitchell of the Dallas office to keep them on his desk "with no action on them" (RT 169).

On November 13, three days later, Morton, IMI's President, telephoned Moore and asked him to accept the two IMI purchase orders in lieu of a purchase order from Union (RT 359). Moore refused. He told Morton that he would not release any of the shipments unless Union agreed to pay Mosher directly for Mosher's work (RT 360). He suggested that Morton "get in touch with Mr. Page (Union's Comptroller) and give his approval of having them (Union) pay for this work" (RT 359).

On November 15, Moore telephoned Page and asked Page if he had obtained Morton's approval "for them (Union) to pay us direct and deduct it from the contract" between the joint venture and Union (RT 362). Page told Moore (RT 362): "He said that he had talked to Mr. Morton and Mr. Morton had given him approval".

On November 16, 1961, the day after Moore's conversation with Page, and simultaneously with the receipt of a telegram from Page, Moore released the order for shipment (RT 365). On the same day, he instructed Mitchell of Mosher's Dallas office to enter a supplement, #2, "to change customer's name from Graver Tank & Manufacturing Co. to Idaho-Maryland Industries, Inc." (Jt. Ex. 13; RT 91-93; 169). The supplement also recorded the fact that "all shipments are to be made to Graver Tank and Manufacturing Co." at Tucson (Jt. Ex. 13). At the same time, Moore directed the entry of a Mosher shop order for the Vandenberg fabrication (Pltff. Ex. 22A; RT 101).

The following indisputable facts were incontrovertibly established by Mosher's records:

1. The name of the customer upon the plaintiff's shop orders was changed by Mosher itself from Graver to IMI (Jt. Ex. 13), and *not* from Graver to the joint venture;

2. The name of the customer upon the plaintiff's weekly production records (Pltff. Ex. 34) was changed by Mosher itself from Graver to IMI, and *not* from Graver to the joint venture;

3. Mosher's accounts receivable ledger for both the Tucson and Vandenberg jobs (Jt. Exs. 17 and 18) show, as Mosher's debtor, only "Idaho-Maryland Industries, Inc." and *not* the joint venture;

4. Every invoice issued by Mosher for the Tucson and Vandenberg jobs (Jt. Ex. 14) show that the materials were sold only to IMI and *not* the joint venture, with the additional typed inscription thereon: "Customer Graver Tank Manufacturing Co." under the printed heading "Shipped to and Destination"; and

5. On February 20, 1962, after IMI's bankruptcy, Moore, as Secretary-Treasurer of Mosher, wrote to Fluor, advising Fluor that it furnished "Idaho-Maryland Industries, Inc.", and *not* the joint venture, "approximately $296,000.00 of fabricated steel and for fabricating steel furnished by Graver Tank" (Jt. Ex. 81).

**IMI's Bankruptcy**

Prior to the completion of Mosher's work and on February 2, 1962, IMI *individually* filed a voluntary petition in bankruptcy in the United States District Court for the Southern District of California, Central Division (R 674-675) seeking a rearrangement under Chapter XI of the Bankruptcy Act (R 1235).

On August 10, 1962, and before the within action was commenced, Mosher filed its proof of claim in the IMI bankruptcy proceedings (Union Ex. E; R 1236; 676-679). As appears therefrom, Mosher claimed that IMI, *individually,* was "justly and truly indebted to the plaintiff corporation for the sum of $321,053.54" (R 676), the exact amount for which the present action was brought against Ward and Union (R 268-280). Mosher annexed, as exhibits to its proof of claim, its invoices to IMI (R 677) and the two purchase orders from IMI of November 3, 1961 (R 672-673), alleging that they were "the purchase orders upon which the debt is founded . . ." (R 677).

Mosher filed its claim against IMI as an individual creditor of IMI upon an individual obligation of IMI. It also alleged in its proof of claim (R 678):

> "Claimant corporation claims that Ward Industries Corporation, as joint venturer with the Debtor, and Union Tank Car Company through its Division, Graver Tank & Mfg. Co., are also liable to claimant corporation for the entire said debt . . . Claimant corporation's filing of the within claim in this proceeding is made without prejudice to its rights against the said Ward Industries Corporation and the said Union Tank Car Company through its Division, Graver Tank & Mfg. Co., and claimant corporation retains and reiterates said claim against said companies."

On December 31, 1963, a final judgment was entered by the Bankruptcy Court allowing the plaintiff's claim against IMI in full for the sum of $321,053.54 (R 680-681). As appears from the face thereof, the judgment was entered after "hearing before the Court . . . and the issues having been duly tried and a decision having been duly

rendered" (R 680; Union Ex. D). IMI was ordered to issue to the plaintiff "642,107 shares of capital stock in the Debtor corporation to Mosher Steel Company pursuant to the Plan of Arrangement heretofore confirmed and, when so issued, any and all obligations of said Idaho-Maryland Industries Inc. to Mosher Steel Company, which obligations are set forth in Claim #832, are hereby declared to be *extinguished and satisfied in full*" (R 681; Union Ex. D).

Mosher stipulated in this case, and the District Court found, that the number of shares provided by the judgment of the Bankruptcy Court were duly issued by IMI and accepted by it; that subsequent to such issuance and acceptance, a reverse split was voted whereby Mosher received one share of stock of Allied Equities Corporation ("Allied"), the successor of IMI, for every 20 shares of IMI stock; that it became the owner and holder of the shares of stock so issued by Allied in exchange for the shares of stock of IMI; and that the value of those shares was the sum of $52,170.62 (R 1239).[2]

It is equally undisputed that no petition in bankruptcy has ever been filed by Ward or the joint venture. The bankruptcy of IMI was a bankruptcy of IMI alone. As appeared from the undisputed testimony of IMI officers, IMI was the owner of approximately seven divisions located in California, Colorado and Arizona (R 665). Approximately 50% of the production of those divisions was totally unconnected with IMI's joint venture enterprises at Tucson and Vandenberg, being individual contracts in which IMI was individually engaged (R 665). In connection with such individual work, IMI incurred substan-

[2] The aforesaid sum of $52,170.62 was deducted from the amount sued for in this action by Mosner (R 1239).

tial individual obligations and realized substantial individual accounts receivable. Both the accounts receivable, as well as the accounts payable, were due and owing from and to IMI individually, and were in no way connected with or related to the joint venture (R 665).

### Ward's Motions for Summary Judgment and Dismissal

On November 2, 1964, Ward moved for a summary judgment in this case upon the ground that the final judgment in favor of Mosher rendered by the Bankruptcy Court in the individual bankruptcy of IMI, and the recovery provided therein for Mosher, which Mosher thereafter received in full, was final, binding and conclusive in the present suit and forever barred and judicially estopped Mosher from maintaining the within action against Ward for the identical claim allowed by the Bankruptcy Court (R 650-694).

By its motion, Ward called the attention of the Court to the statutory scheme embodied for decades in the Bankruptcy Act, 11 U.S.C. § 23 (g), as interpreted by this Court and various Courts of Appeals, and more particularly the Court of Appeals for the Tenth Circuit in *Eads Hide & Wool Co.* v. *Merrill,* 252 F. 2d 80 (1958), which held that a claimant who has declared himself to be an individual creditor of a bankrupt partner, and accepted its pro rata share of the individual assets of the bankrupt with other individual creditors, cannot thereafter claim that the obligation was, in fact, a partnership or joint venture obligation for which it was subsequently entitled to sue the non-bankrupt partner or joint venturer.

The District Court denied the motion. Upon the conclusion of the trial herein, Ward again moved for a dis-

missal of Mosher's case against it and the motion was again denied.

### The Decision of the Court of Appeals Herein

Upon its appeal to the Court of Appeals herein, Ward again urged that the recovery granted to Mosher against Ward by the Arizona District Court was in conflict with the provisions of the Bankruptcy Act, 11 U.S.C. § 23 (g), as well as the decisions of this Court and the several Courts of Appeals, particularly the Tenth Circuit in the *Eads* case, *supra*. In overruling Ward's position, the Court of Appeals declared (Opinion, Appendix A, pp. 8a-9a):

> "Both Union and Ward argue that because Mosher filed a claim in the IMI bankruptcy proceedings representing that the amount due Mosher was an unsecured independent obligation of IMI, and because Mosher accepted a distribution of the stock of the reorganized debtor on the basis of this claim, it is estopped from asserting that Union and Ward are liable. The result urged by Union and Ward can obtain only if it is required by some legal fiction for Mosher in its proof of claim against IMI explicitly reserved its rights against Ward, Union, Fluor, and the sureties.
>
> Thus, unlike the claimant in *Eads Hide & Wool Co.* v. *Merrill*, 252 F. 2d 70 (10th Cir. 1958), which is relied on by Ward and Union, Mosher did not in the bankruptcy proceedings elect the remedy of recovery against only one of the allegedly liable parties. Moreover, Mosher did not assume different positions as to the facts in that proceeding and in this. It is not for us to say whether the decision allowing Mosher's claim in the bankruptcy proceeding was correct. We do hold that Mosher's full disclosure and express re-

tention of rights in this proceeding precluded an estoppel against Mosher in this litigation."

Under the foregoing ruling of the Court of Appeals, the statutory scheme contained in the Bankruptcy Act, 11 U.S.C. § 23 (g) can be circumvented and annulled by the simple expedient of including in a proof of claim filed by an individual creditor upon an individual obligation of an individual bankrupt, the statement that it was being filed "without prejudice"; thereby enabling the creditor to recover, subsequently, the remaining balance against the non-bankrupt partner or joint venturer upon the ground that the obligation was not an individual obligation but was in fact a partnership or joint venture obligation.

It is respectfully submitted by the petitioner that the decision of the Court of Appeals is in direct conflict with the explicit phraseology of the Bankruptcy Act, the prior decisions of this Court and the determinations of various Courts of Appeals, including the decision of the Tenth Circuit in *Eads Hide & Wool Co.* v. *Merrill, supra.* The petitioner respectfully prays that a writ of certiorari issue for the purpose of reviewing the decision of the Court of Appeals herein in order to determine whether the Bankruptcy Act, 11 U.S.C. § 23 (g) and the Congressional scheme of distribution provided therein may be so easily vitiated and annulled.

## Reasons for Granting the Writ

**1. The Final Judgment Against IMI Procured By Mosher In The IMI Bankruptcy Proceeding Was Based Upon Mosher's Claim That The Obligation For The Materials Fabricated And Delivered To The Tucson And Vandenberg Jobs Was An Individual Obligation Of IMI Created By The Independent Undertaking Of IMI. After Obtaining The Benefit Of That Final Judgment, Mosher Cannot, In Violation Of The Bankruptcy Act, 11 U.S.C. § 23 (g), Completely Reverse Its Position And Now Contend That The Obligation Upon Which It Collected In The Bankruptcy Court Was Not An Individual Obligation Of IMI But An Obligation Of The Joint Venture Of IMI-Ward.**

On February 2, 1962, IMI individually filed a petition in bankruptcy. Upon the filing of that petition, Mosher was confronted with the necessity of choosing between two diametrically opposed alternatives. Were the materials which it fabricated and delivered to the Tucson and Vandenberg jobs fabricated and delivered under an individual and independent undertaking of IMI, thereby creating an individual liability, or was it a joint venture obligation upon which IMI and Ward as separate entities were only secondarily responsible as joint venturers as a consequence and incident of partnership law?

The resolution of these questions depended upon Mosher's treatment of the two purchase orders dated November 3, 1961 for the Tucson and Vandenberg jobs, issued to Mosher upon the purchase order forms of IMI. If those purchase orders constituted an individual obligation of IMI, then, under the Bankruptcy Act, 11 U.S.C. § 23 (g), Mosher was entitled to file its claim for the full

amount of $321,053.54 against IMI individually on an equal basis with all individual creditors of IMI, and share equally with all other creditors of IMI in the assets of IMI. If, on the other hand, these purchase orders, regardless of the manner in which they were signed and issued, created an obligation of the joint venture, then, under the provisions of 11 U.S.C. Section 23 (g), Mosher could only file a claim in the bankruptcy proceedings of IMI as a creditor of the joint venture. Such a claim would have been subordinated to the claims of the individual creditors of IMI and limited solely to any surplus available to joint venture creditors which might exist after the individual creditors of IMI had been satisfied in full.

On August 10, 1962, six months after the bankruptcy petition was filed, with a full and comprehensive knowledge of all the facts, i.e., the existence of the joint venture and IMI's participation therein as a joint venturer, Mosher made its election, an election which, under the Bankruptcy Act and decisional law, was final, binding and conclusive. As appears from its proof of claim (R 676-679), it elected to file a claim against IMI as an individual creditor of IMI, upon the ground that the purchase orders of November 3, 1961 created an individual and independent liability of IMI. It annexed, as an exhibit to its proof of claim, the two purchase orders of November 3, 1961, alleging that they were "the purchase orders upon which the debt is founded * * *." (Proof of claim, par. 7, R 677.)

On December 31, 1963, a final judgment was entered by the Bankruptcy Court, allowing Mosher's claim against IMI in the sum of $321,053.54 and providing for its extinguishment and satisfaction "in full" by IMI (R 680-681). The benefits provided by that judgment have been received by Mosher in full. That judgment constituted a complete and total bar to Mosher's attempted assertion of

the identical claim in this lawsuit against Ward based upon the completely contradictory theory that the two purchase orders of November 3, 1961 created not an individual and independent obligation of IMI, but a joint venture obligation for which Ward is liable as an incident of partnership law.

In *Eads Hide & Wool Company* v. *Merrill,* 252 F. 2d 80, the Tenth Circuit held that a creditor who had filed his claim in the individual bankruptcy of Chapman as an individual creditor of the bankrupt and shared pro rata in the individual bankrupt's assets, was judicially estopped from later asserting that the obligation was, in fact, a partnership obligation for which Merrill, the alleged non-bankrupt partner, could be held responsible in an independent action subsequently instituted against him. In its comprehensive opinion, the Tenth Circuit declared:

> "Appellant has formerly asserted a right to share in the individual estate of a bankrupt partner on an equal basis with other individual creditors. * * * Having thus recognized Merrill as a creditor of the Chapman estate and having thus declared itself to be a creditor of Chapman individually through its acceptance of dividends to the detriment of other general creditors, it must be held estopped to now claim that the obligation due it was a partnership obligation."

The provisions of the Bankruptcy Act, 11 U.S.C. § 23 (g), to which the Court of Appeals referred, provides that:

> "The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of such partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such sur-

> plus shall be added to the partnership assets and be applied to the payment of the partnership debts."

Under the foregoing provisions of the Bankruptcy Act, the distinction between an individual and a firm indebtedness is a matter of substance. In the language of this Court in *Schall* v. *Camors,* 251 U. S. 239, at 255: "Hence the distinction between individual and firm debts is a matter of substance, and must depend upon the essential character of the transactions out of which they arise."

In determining whether an indebtedness claimed by a creditor is an indebtedness of the partnership or an independent and separate indebtedness of an individual partner, the nature of partnership liability must be borne in mind. A distinction must be drawn between the liability imposed upon each member of a partnership as an incident and consequence of partnership law, and the separate liability of a partner created by his independent and individual jural act, i.e., an individual endorsement, an individual guarantee or an individual undertaking. The distinction was emphasized by the New York Court of Appeals in *Ruzicka* v. *Rager,* 305 N. Y. 191, 199 in the following words:

> "To some degree the individual liability of a partner is not the ordinary individual l[i]ability of one who obligates himself as an individual. Rather, the individual liability of a partner is merely an incident of the partnership liability. Judge POUND writing for the court in Hartigan v. Casualty Co. of America (227 N. Y. 175, 178, supra) phrased the conception clearly and concisely as follows: 'When a partnership is established, the liability of the individual partners is an incident of the partnership, merely, not a separate and independent liability.' "

Under bankruptcy law, if the basis of the liability sought to be imposed upon the individual partner is a partnership or joint venture indebtedness, and the individual partner is sought to be held therefor under partnership law, the creditor cannot file a claim against the individual bankrupt partner as an individual obligor. He can only file a claim against the individual bankrupt partner as a creditor of the partnership. In so doing, he must subordinate his claim to those of individual creditors of the partner and can only share in the surplus, if any, which might remain, after the individual creditors of the individual partner have been satisfied in full.

Thus, in *Schall* v. *Camors,* 240 Fed. 6, aff'd by this Court in 251 U. S. 239, the decision cited by the Court in the *Eads* case, *supra,* a creditor sought to file a claim against the individual estate of an individual bankrupt partner. He attempted to justify the filing upon the ground that the individual bankrupt was liable under partnership law for all of the obligations of the partnership. The Court pointed out that the partners in the transaction had not obligated themselves separately and independently and that, in the absence of a separate and individual obligation, the mere existence of liability under partnership law would not warrant or support the filing of a claim against the estate of an individual partner upon a partnership obligation. The Court ruled:

> "Each partner and his property are individually liable for all partnership debts as between him and the partnership creditor, and this obligation is joint and several at the option of the creditor. ***But as between his individual and partnership creditors, under the Bankrupt Law, the primary liability of his property is to the former.*** It would be contrary to the policy of the Bankrupt Law to permit the firm cred-

itor, by invoking such a technical rule of law, to place himself on a parity with the individual creditors of the partners as to his individual assets, and so circumvent the equitable distribution of partnership assets among firm and individual creditors provided for in the act."

The foregoing rules of law have been rigorously applied even where a judgment has been obtained in the state courts, under partnership law, against individual partners because of their liability, under state law, for partnership debts. *In re F. J. Hacker & Co.*, 225 Fed. 869, the Waterloo Register Company, a corporation, recovered judgments against the partnership and the individual members thereof upon a partnership obligation. It then filed those judgments against the individual estates of the bankrupt partners, asking that they be allowed as unsecured claims against the individual estates and that it be permitted to share in the assets of such estates equally with the individual creditors of such partners. The District Court refused to allow the claim. In affirming the District Court, the Court of Appeals for the Eighth Circuit, in 238 Fed. 146, ruled as follows:

"The indebtedness to the appellant was primarily that of the partnership. The partners had not individually contracted to pay it, and the judgments against them were but the legal conclusion from their relation to the firm. *The judgments against the partners, as well as the partnership, did not change the inherent character of the indebtedness.* While merger in judgment is the general rule, yet according to recognized exceptions the judgment will be construed as a new form of the old debt when justice and equity require. The incident of the old debt will be carried

forward to prevent the inequitable destruction of a right, privilege, or exemption."

A decision by the Court of Appeals for the Fifth Circuit is likewise in accord. *In re Hurley Mercantile Co.*, 56 Fed. 2d 1023, a bank procured a judgment against a partnership upon a promissory note executed by the partnership. A judgment was likewise rendered against the individual partners because of their liability therefor under State law. The bank filed a claim, based upon the judgment, against the individual partner in his individual bankruptcy proceedings. In refusing to allow the claim, the Court of Appeals affirmed the Referee's ruling to that effect as follows:

> "The referee's ruling was right. It is true that each partner is individually liable for every partnership debt, but for purposes of bankruptcy the partnership with its property and debts is considered a separate entity from the partners with their several estates and creditors. The Bankruptcy Act requires them to be kept separate for administration, and that partnership assets be first applied to partnership debts. Bankr. Act Section 5 (11 USCA Section 23).
>
> * * * Any other holding would disregard the requirement of Bankr. Act Section 5f, 11 USCA Section 23 (f), that the net proceeds of the partnership property shall be appropriated to the payment of the partnership debts and the net proceeds of the individual estate of each partner to the payment of his individual debts."

Under the foregoing authorities, it is indisputably clear that the final judgment procured by Mosher against IMI in the IMI bankruptcy proceeding constituted an irrevocable determination that the IMI purchase orders of No-

vember 3, 1961 created a primary and individual obligation of IMI, and not an obligation of the joint venture.

Mosher has shared in the individual assets of IMI, as an individual creditor of IMI, pro rata with all other individual creditors of IMI, upon an obligation created by the purchase orders of November 3, 1961 which it claimed to be the separate, individual and independent obligation of IMI. It cannot now, in this action, escape the consequences of the position which it then took, and the judgment which it obtained in the IMI bankruptcy proceedings, by advancing the completely contrary argument that the obligation upon these purchase orders did not create an individual obligation of IMI, but rather a joint venture obligation, and that IMI was, in any event, liable for that indebtedness as a member of the joint venture. The liability imposed upon IMI as a joint venturer, under partnership law, could not possibly have justified the individual judgment and recovery obtained by Mosher as an individual creditor of IMI in IMI's individual bankruptcy proceeding.

By procuring a final judgment in the bankruptcy proceeding and availing itself in full of the benefits provided therein, Mosher irrevocably elected to treat the indebtedness for its deliveries to the Tucson and Vandenberg jobs as a separate and independent indebtedness of IMI, and not as an indebtedness of the joint venture. Its present position would constitute a fraud upon all of the individual creditors of IMI whose claims against IMI individually were diminished by the distribution made to Mosher as an individual creditor of IMI.

Upon the undisputed facts herein, and the authorities applicable thereto, it is plain that only one conclusion can be reached upon this record, to wit, that Mosher is barred, estopped and forever precluded from asserting any liabil-

ity against the joint venture, or Ward as a member of the joint venture, upon the ground that the joint venture and not IMI individually was liable for the plaintiff's debt. In the language of this Court in *Gardner* v. *New Jersey,* 329 U. S. 569, at 572: "It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance *must abide the consequences of that procedure.*"

**2. The Statutory Scheme Of Distribution Embodied In The Bankruptcy Act, 11 U.S.C. § 23 (g), Cannot Be Circumvented And Annulled By The Device Of Including In The Proof Of Claim Filed By An Individual Creditor Upon The Individual Obligation Of An Individual Bankrupt The Statement That It Was Being Filed "without prejudice" To The Creditor's Right To Recover Against A Non-Bankrupt Partner Or Joint Venturer Upon The Ground That The Obligation Was In Fact A Partnership Or Joint Obligation.**

In its opinion, the Court of Appeals has held that *Eads Hide & Wool Co.* v. *Merrill,* 257 F. 2d 90 (10th Cir. 1958) was not applicable to the instant case because, in the bankruptcy proceedings, Mosher had filed its claim "without prejudice to its rights against the said Ward Industries Corporation. . . ." Consequently, according to the Court of Appeals Opinion, Appendix A, p. 9a:

> "Moreover, Mosher did not assume different positions as to the facts in that proceeding and in this. It is not for us to say whether the decision allowing Mosher's claim in the bankruptcy proceeding was correct. We do hold that Mosher's full disclosure and express retention of rights in that proceeding preclude an estoppel against Mosher in this litigation."

In effect, the Court of Appeals has ruled that the provisions of the Bankruptcy Act and the scheme of distribution provided for therein, may be totally circumvented by the simple expedient of filing a claim in the individual bankruptcy and adding thereto the words "without prejudice". The Congressional scheme of distribution embodied for decades in 11 U.S.C. § 23 (g) cannot be so easily destroyed.

The fact of the matter is that, contrary to the opinion of the Court of Appeals, Mosher has assumed an entirely different and contradictory position upon the facts in this litigation than it adopted in the bankruptcy proceedings. In the bankruptcy proceedings, it established to the satisfaction of the Court that the obligation of IMI upon the purchase orders of IMI was an individual obligation of IMI for which it was entitled to file a claim as an individual creditor of IMI. In the present litigation, it has asserted that the self-same purchase orders were not purchase orders of IMI but purchase orders of the joint venture which created a joint venture obligation rather than an individual obligation of IMI. The latter position constitutes the entire evidentiary base of Mosher's cause of action against Ward in this lawsuit. It is the position sustained by the District Court in its findings of fact, conclusions of law and final judgment against Ward (R 1229, 1239, 1241). It is the position affirmed by the Court of Appeals herein.

In the bankruptcy proceeding, the Bankruptcy Court was not dealing with the propriety, sufficiency or validity of Mosher's claim against Ward as a member of the joint venture. It was dealing solely and only with the issues and proofs submitted to it by Mosher as a claimant in the bankruptcy proceedings. Upon those proofs, it rendered its judgment after a "hearing before the Court"

and "the issues having been duly tried. . . ." (R. 680). In that proceeding, Mosher established as a juridically conclusive fact that the obligation created by the IMI purchase orders was an individual obligation of IMI.

Whether that decision was juridically sound or not, and the Court of Appeals seems to intimate in its opinion that it was not, is utterly beside the point. The judgment was in fact entered upon the claim of Mosher *as an individual creditor;* the benefits were in fact received by Mosher *as an individual creditor;* and the *individual obligation of IMI to Mosher* was in fact "extinguished and satisfied in full".

The Bankruptcy Court did not by its determination provide any judicial sanction for the subsequent assertion in this lawsuit of Mosher's claim against Ward as a joint venturer. It was not within its jurisdiction or power to do so. It merely relegated to this action whatever rights Mosher chose to assert, leaving it to the District Court in this lawsuit to determine whether any such rights did in fact exist. Consequently, Mosher's so-called "disclosure and express retention of rights" in the bankruptcy proceeding did not preclude, as the Court of Appeals has held, a judicial estoppel against Mosher in this litigation.

The ruling of the Court of Appeals in this regard will totally extinguish and destroy the Congressional scheme of distribution provided by the Bankruptcy Act. It will permit a creditor to do what the Congress has said he cannot do, to claim as an individual creditor upon an individual obligation of a bankrupt partner or joint venturer and then, having shared in the individual assets of the bankrupt equally with all other individual creditors, to proceed upon the basis that the identical obligation did not in fact constitute an individual obligation, but a joint venture obligation for which the non-bankrupt partner or

joint venturer could still remain liable. Such a holding is in total conflict with the Bankruptcy Act, the *Eads* decision, *supra,* and the innumerable decisions of this Court and the Court of Appeals which have repeatedly, over decades, sustained and enforced the scheme of distribution embodied by the Congress in 11 U.S.C. § 23 (g). Unless reversed, the decision of the Court of Appeals herein, will effectively nullify that scheme of distribution.

## CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the within petition for a writ of certiorari be granted by this Court.

Respectfully submitted,

JOSEPH LOTTERMAN
103 Park Avenue
New York, New York 10017

and

R. GRAEME SMITH
1 American Row
Hartford, Connecticut 06103

*Attorneys for Petitioner,*
*Ward Industries Corporation*